Rieth-Riley Construction Co., Inc. *and* Rayalan A. Kent, Petitioner and Local 324, International Union of Operating Engineers (IUOE), AFL–CIO.
Cases 07–RD–257830 and 07–RD–264330

February 8, 2021

ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

The Employer's and Petitioner's requests for review of the Regional Director's Decision and Order—Case 07–RD–257830 and Supplemental Decision and Order—Case 07–RD–64330 are granted as they raise substantial issues warranting review, especially with respect to whether the Regional Director's decision to dismiss the petitions is consistent with Section 103.20 of the Board's Rules and Regulations. See also Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed.Reg. 18366 (April 1, 2020).

Dated, Washington, D.C. February 8, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting.

I would deny the Employer's request for review. There is no need to reach the issue of whether the Regional Director's decision to dismiss the petitions is consistent with the Board's so-called "Election Protection Rule," because it is clear that the Rule should not apply to the petitions here. Moreover, even if the Rule did apply, there is no clear conflict between the Regional Director's decision and the Rule as it now exists.

The Board has held that the Rule applies only to petitions filed after the effective date of the Rule, July 31, 2020. See Order Denying Review, *Arakelian Enterprises, Inc.*, 21–RD–223309, 2020 WL 5658310 (Sept. 22, 2020). Here, the Petitioner filed an initial decertification petition on March 10, 2020. This petition was properly blocked under the Board's prior blocking-charge rules due to an outstanding unfair labor practice complaint in Case 07–CA–234085.[1] The Board denied review of the Regional Director's blocking determination on June 20, 2020. This initial petition continued to remain blocked, even as the new Rule went into effect on July 31, 2020. But, on August 7, 2020, the Petitioner filed a second decertification petition in the very same unit, and the Regional Director decided to process this second petition under the new Rule instead of the prior blocking-charge policy.

It is obvious that the sole purpose of this second petition was to attempt an end run around the prior blocking-charge policy and the Board's holding in *Arakelian Enterprises.* There is no indication that anything had changed with respect to the composition of the unit, employee sentiment regarding decertification, or even the procedural posture of the still-pending unfair labor practice case. The only difference was that the new Rule had gone into effect while the initial petition was—correctly—being held in abeyance. If the effective date of the new Rule, and the Board's holding in *Arakelian Enterprises*, are to have any meaning at all, they cannot be circumvented simply by filing a new petition. Because the prior blocking-charge policy should apply to the second petition just as it did to the first, the dismissal of the second petition was proper—and there is no reason for the Board to grant review.

But even if the new Rule were somehow applicable to the second petition, the Regional Director's dismissal appears to be entirely consistent with the Board's policies and procedures. The Board has a longstanding practice of dismissing petitions subject to reinstatement when a "merit determination"—often marked by the issuance of a complaint—is made with respect to unfair labor practice charges that allege certain types of conduct, such as where the Regional Director finds a causal connection between the conduct alleged in the complaint and the petition (as the Regional Director did here), or where the General Counsel seeks an affirmative bargaining order against the employer (as the General Counsel has sought in Case 07–

[1] The complaint alleged multiple violations of Sec. 8(a)(5) of the Act, including that the Employer engaged in bad-faith bargaining over a successor collective-bargaining agreement, insisted on bargaining over a permissive subject, engaged in an unlawful lockout in furtherance of its unlawful bargaining objective, and made unilateral changes to wages and to paycheck deductions for holiday and vacation funds. The complaint seeks an affirmative bargaining order.

CA–234085).[2] Nothing in the plain language of the new Rule abrogates this practice, nor does Board's preamble to the Rule mention, much less purport to modify, the Board's established procedures in this area.[3] In fact, the Board's Casehandling Manual, Part II—which was updated in light of the new Rule—explicitly retains references to a Regional Director's discretion to dismiss a petition, subject to reinstatement, under such circumstances. See Sections 11733.1(a)(1); 11733.1(a)(2); and 11733.1(a)(3). Under these circumstances, there is no "compelling" reason to grant review under the standard of Section 102.67(d) of the Board's Rules and Regulations.[4] Indeed, if the new Rule fails to address the issue that the majority sees presented here, then further rulemaking—not a Board adjudication—would seem to be required. "[An] administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication."[5]

In short, because dismissal of the petition here was compelled by *Arakelian Enterprises* and because, in any case, the Regional Director's dismissal seems consistent with established Board law and practice, I would deny review.

Dated, Washington, D.C. February 8, 2021

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

[2] See, e.g., *Overnite Transportation Co.*, 333 NLRB 1392, 1392–1393 (2001); *Big Three Industries*, 201 NLRB 197, 197 (1973); *Brannan Sand & Gravel*, 308 NLRB 922, 922 (1992).

[3] See Sec. 103.20 of the Board's Rules and Regulations; Representation-Case Procedures: Election Bars; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed.Reg. 18366 (April 1, 2020).

[4] Rule 102.67(d) reads:

> *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of:
>
> (i) The absence of; or
>
> (ii) A departure from, officially reported Board precedent.
>
> (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

[5] *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003).